

**BEFORE THE  
TENNESSEE REGULATORY AUTHORITY**

**June 8, 2000**

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COMM. DIV.

**In Re:**

Petition for Arbitration of ITC^DeltaCom  
Communications, Inc. with BellSouth  
Telecommunications, Inc. Pursuant to the  
Telecommunications Act of 1996

**Docket No. 99-00430**

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**RESPONSE OF ITC^DELTACOM COMMUNICATIONS, INC.  
TO BELL SOUTH TELECOMMUNICATIONS, INC.'S MOTION FOR  
RECONSIDERATION**

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**I. INTRODUCTION**

COMES NOW ITC^DeltaCom Communications, Inc. ("ITC^DeltaCom") and hereby files this Response to BellSouth Telecommunications, Inc.'s ("BellSouth") Motion for Reconsideration. On April 4, 2000, the Directors announced their decision in this docket.<sup>1</sup> However, no written order has been issued. On May 22, 2000, BellSouth filed a Motion for Reconsideration, requesting that the panel reconsider certain aspects of its resolution of Issue 1(a). Specifically, BellSouth seeks reconsideration of the decision to require that the interconnection agreement resulting from this proceeding contain certain modifications to

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<sup>1</sup> The hearing in this matter was conducted on November 1-3, 1999 before Directors Malone, Greer, and Kyle, acting as arbitrators under Section 252 of the Telecommunications Act of 1996 (the "Act").

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BellSouth's Service Quality Measurements ("SQMs") and include corresponding enforcement mechanisms.

BellSouth's Motion for Reconsideration should be dismissed for three basic reasons. First, the Motion is premature. Second, BellSouth is simply incorrect in its assertion that the Texas Plan is not in the record. Third, BellSouth offers no new evidence or arguments in the Motion. These three reasons for denial of BellSouth's Motion are fully discussed below.

## **II. DISCUSSION**

### **A. BellSouth's Motion Is Premature.**

The Tennessee Uniform Administrative Procedures Act (the "Act") states that "[a]ny party, within fifteen (15) days after entry of an initial or final order, may file a petition for reconsideration, stating the specific grounds upon which relief is requested." T.C.A. § 4-5-317(a). The Act further provides that a final or initial order "shall be rendered in writing within ninety (90) days after conclusion of the hearing or after submission of proposed findings. . . unless such period is waived or extended with the written consent of all parties or for good cause shown." T.C.A. § 4-5-314(g).

The arbitration panel announced its decision regarding the issues in this docket on April 4, 2000. The oral decision is not a final written order. Therefore, BellSouth's motion should be denied as premature.<sup>2</sup>

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<sup>2</sup> Alternatively, if the oral decision on April 4, 2000, is a final order, BellSouth's Motion should be dismissed because it was not timely filed. Pursuant to T.C.A. § 4-5-317(a), motions for reconsideration must be filed within fifteen days after entry of an initial or final order. BellSouth did not file its Motion until May 22, 2000, thirty-three days after the fifteen-day deadline.

**B. The “Texas Plan” Is Part of the Record in the ITC^DeltaCom Case.**

BellSouth does not dispute the fact that the Texas Plan was extensively discussed in the ICG arbitration. *See* BellSouth’s Motion for Reconsideration, at 3. BellSouth asks the panel to abandon its decision requiring the parties to incorporate enforcement measures from the “Texas Plan” into the interconnection agreement because BellSouth contends the Texas Plan “is not even a part of the record in this proceeding.” *Id.* BellSouth is blatantly incorrect in its contention.

The Texas Plan was discussed by ITC^DeltaCom Witness Christopher Rozycki and BellSouth witness Alphonso Varner in the ITC^DeltaCom arbitration and was made part of the record in *In re: Petition of ICG Telecom Group, Inc., for Arbitration with BellSouth Telecommunications, Inc., Pursuant to Section 252 of the Telecommunications Act of 1996*, Docket No. 99-00377. On January 25, 2000, in the ITC^DeltaCom arbitration with BellSouth, Director Greer moved to take judicial notice of the record in the ICG arbitration with BellSouth, Docket No. 99-00377, thus making the ICG record part of the record in this docket:

. . .

Director Greer: And I would like to make a motion at this time in this docket, 99-00430, the ITC DeltaCom case, that we also take judicial notice of the ICG case - - arbitration - - ICG/BellSouth arbitration, and that would be the entire docket.

Director Kyle: That would be fine with me.

Chairman Malone: If we could have the parties to the DeltaCom case come forward and identify yourselves and state whether or not you have any objections to the motion.

. . .

Nanette Edwards: ITC DeltaCom has no objection to taking judicial notice of the ICG case.

Guy Hicks: Nor does BellSouth have any objection, Mr. Chairman.

*See* Transcript of Proceedings, at 3-4 (January 25, 2000).

BellSouth expressly waived any objection to Director Greer's motion to take judicial notice of the record from the ICG arbitration. BellSouth cannot object now. The Texas Plan is part of the record in the ITC^DeltaCom arbitration with BellSouth, and the panel properly considered it when making its decision.

Additionally, during the hearing, both BellSouth and ITC^DeltaCom made references to the Texas Plan. ITC^DeltaCom witness Rozycki testified that ITC^DeltaCom's proposed performance measurements were based upon a set of draft performance measurements prepared by the Staff of the Texas Public Service Commission. *See* Tr. Vol. IA, at 44-45 (November 1, 1999). ITC^DeltaCom's proposal was based on the Texas Plan and is undoubtedly part of the record in this case. Mr. Rozycki also sponsored as an exhibit portions of an interconnection agreement between Southwestern Bell Telephone and Southside Communications, LLC, which incorporated some of the provisions from the Texas Plan. BellSouth witness Alphonso Varner in turn referred to the Texas Plan. *See* Tr. Vol. IIIA, at 600-601 (November 3, 1999).

The ICG record was consolidated with the ITC^DeltaCom record, and the witnesses discussed the Texas Plan in the ITC^DeltaCom case. Therefore, as Director Greer stated, "[it] shouldn't come as a total surprise that the Texas Plan was under consideration or

parts of it were under consideration during the deliberations and during the negotiations.” *See* Transcript of the Proceedings, at 42 (April 4, 2000).

C. **Section 252 of the Act Confers Upon the TRA Broad Discretion to Resolve Any Unresolved Issue As It Deems Appropriate.**

BellSouth asserts that the panel should abandon its decision to require the parties to incorporate enforcement measures from the Texas Plan into the interconnection agreement because the proposed modifications do not precisely correspond with ITC^DeltaCom’s proposal. BellSouth offers no legal support for this contention. Indeed, as discussed below, the courts have found to the contrary.

State Commissions act as arbitrators under the Act. Federal courts have held that arbitrators have broad discretion in considering the issues presented by the parties and in resolving these issues. *See Wailua Associates v. Aetna Casualty and Surety Co.*, 904 F.Supp. 1142 (D.Haw. 1995); *Sunshine Mining Co. v. United Steel Workers of America*, 823 F.2d 1289, 1294 (9th Cir. 1987); *Hoteles Condado Beach v. Union De Tronquistas Local 901*, 763 F.2d 34, 38 (1st Cir. 1985). Section 252 of the Act provides that “[t]he State Commission shall resolve each issue set forth in the petition and the response, if any, *by imposing appropriate conditions as required* to implement subsection (c) of this section upon the parties to the agreement, and shall conclude the resolution of any unresolved issues. . .” 47 U.S.C. § 252(b)(4)(C) (emphasis added). It is irrelevant that neither ITC^DeltaCom nor BellSouth proposed the exact modifications ordered by the panel. The panel has discretion to fashion resolutions to unresolved issues consistent with the Act and the public interest. Nowhere in the Act does it state that a State commission must correspond its resolution of the issues to the precise proposals of the

parties. The panel conducted a full evidentiary hearing on the issue of performance measurements and guarantees and crafted a plan that it believes “to be just, reasonable, and nondiscriminatory, as required by federal law.” *See* Transcript of the Proceedings, at 17 (April 4, 2000).

**D. BellSouth States No Sufficient Grounds for the TRA to Grant its Motion for Reconsideration.**

BellSouth further argues that the panel’s modifications are unnecessary in determining whether BellSouth is complying with its obligations under the Act. This argument by BellSouth is untenable. As stated above, the panel conducted a full evidentiary hearing on the issue of performance guarantees and rendered its decision. Additionally, this issue has been briefed by both parties extensively at the request of Director Malone. BellSouth is simply using its Motion for Reconsideration to re-arbitrate this same issue.

During the hearing, BellSouth had every opportunity to present its arguments with respect to the Texas Plan or to offer alternative plans. In fact, Director Greer stated:

During the hearing Mr. Varner made it clear that BellSouth did not feel that either the Texas Plan nor the VSEEMs that BellSouth is proposing to the FCC were appropriate for use in the interconnection agreement between BellSouth and DeltaCom. During the hearing, I implored Mr. Varner to present to the Authority something that would be acceptable to BellSouth. He plainly stated that no plan involving enforcement mechanisms would be acceptable to BellSouth without 271 approval.

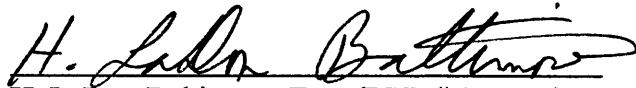
*See* Transcript of the Proceedings, at 17 (April 4, 2000). Now that the panel has made its decision to require the parties to incorporate performance measurements and guarantees in the interconnection agreement, BellSouth is asking for a “do-over.” BellSouth does not offer any newly discovered evidence or any binding change in the law in support of its cry for a “do-over.”

### **III. CONCLUSION**

ITC^DeltaCom has presented evidence to the panel that there is a need for performance measurements and guarantees. ITC^DeltaCom has operated in the BellSouth region for the past two years without any self-executing performance guarantees, and BellSouth's performance has been substandard. BellSouth should be given a strong incentive now to perform through a set of performance measurements and guarantees, as the panel has directed.

BellSouth's Motion should be summarily dismissed as premature and wholly without merit.

Respectfully submitted,



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**CERTIFICATE OF SERVICE**

The undersigned hereby certifies that on the 8<sup>th</sup> day of June, 2000, a true and correct copy of the foregoing was served by hand delivery, facsimile transmission, overnight delivery or U.S. Mail, first class postage prepaid, to the following:

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